



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Shelf Stable Foods, Inc.

File: B-226111, B-226112

Date: April 10, 1987

DIGEST

1. Contracting officer has broad discretion in determining offeror's responsibility and the General Accounting Office will not question a negative determination absent a showing of possible bad faith or lack of any reasonable basis for the determination.

2. Contracting officer may base nonresponsibility determination under solicitation for reprocurment of items on which the same offeror defaulted on the firm's delinquent past performance under the defaulted contract and inadequate performance on other concurrent contracts.

DECISION

Shelf Stable Foods, Inc., protests the award of two contracts to Southern Packing and Storage Company under requests for proposals (RFP) Nos. DLA13H-87-R-8035 and DLA13H-87-R-8103, issued on December 8, 1986, by the Defense Logistics Agency (DLA) for 242,822 pouches of ham slices and 268,166 pouches of ground beef, respectively. The solicitations involved the reprocurment of a portion of contract No. DLA13H-86-C-2050 for 1,259,046 ham slice pouches that had been awarded to Shelf Stable on April 23, 1986, which DLA terminated for default in December. Shelf Stable, the low offeror under each RFP, contends that DLA improperly determined that Shelf Stable was not a responsible prospective contractor. We deny the protests.

In support of its nonresponsibility determinations, DLA has provided us with detailed information of unsatisfactory contract performance by Shelf Stable under contract 2050 and other contracts. As of November 4, Shelf Stable had delivered only 25,344 of the pouches due on contract 2050. On November 12, because of Shelf Stable's delinquency, DLA

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extended the delivery dates under the contract; when no further deliveries had been made by December 5, however, DLA began to terminate Shelf Stable's contract for default in increments, that is, beginning with the first two of four required deliveries less the 25,344 pouches already supplied. In subsequently determining that Shelf Stable was nonresponsive under solicitations 8103 and 8035, the contracting officer noted that Shelf Stable had delivered only 688,896 of the total of more than 5 million pouches required under contract Z050 and three other DLA contracts for pouches of turkey, chicken and ground beef that were awarded at approximately the same time, for an average delivery rate of 137,000 pouches per month. The contracting officer therefore concluded that Shelf Stable lacked the capacity to deliver the additional 510,988 pouches involved in solicitations 8103 and 8035 in the required timeframes (21 to 30 days after award).

On December 23, the contracting officer terminated the remainder of Shelf Stable's original contract. However, when advised by Shelf Stable on December 29 that it had shipped 23,040 pouches of ham that morning, and on January 9, 1987, that it would be able to ship an additional 216,918 pouches right away, the contracting officer agreed to accept the shipments in order to mitigate damages, and amended the original termination notice to reflect those deliveries. The January 15 amended notice also contained a termination for default notice for the option quantity of 186,382 ham pouches required under an earlier modification of the original contract.

Shelf Stable asserts in its defense that its failure to deliver the ham pouches under contract Z050 on time was due to DLA's requirement for new first article testing of the pouches of two new suppliers Shelf Stable had substituted for its original supplier, and that Shelf Stable could have delivered the required quantities by January 16 had its contract not been terminated. Shelf Stable further argues that it did have the capacity to produce the ham and beef pouches required for the two solicitations, and notes that DLA itself awarded Shelf Stable a contract, No. DLA13H-87-C-Z008, for 4,289,532 pouches of ground beef on November 5. Shelf Stable disputes the contracting officer's estimate of its capacity as 137,000 pouches per month, and states that if it had been awarded a contract under solicitation 8103 it could have supplied DLA with the 250,000 pouches of ground beef required by 8103, because they already were in inventory for the first delivery under contract Z008.

The question of whether Shelf Stable's prior performance deficiencies were excusable is a matter of contract

administration and therefore not for resolution under our Bid Protest Regulations. See 4 C.F.R. § 21.3(f)(1) (1986); Decker and Co., et al., B-220807, et al., Jan. 28, 1986, 86-1 C.P.D. ¶ 100. The only question for our review here is whether the contracting officer's nonresponsibility determinations as to solicitations 8035 and 8103 were reasonable based on the information available at the time. In this respect, the contracting officer is vested with a wide degree of discretion and business judgment in determining a prospective contractor's responsibility. American Bank Note Co., B-222589, Sept. 18, 1986, 86-2 C.P.D. ¶ 316. As a general matter, therefore, our Office will not question a contracting officer's nonresponsibility determination unless the protester can show bad faith by agency officials or a lack of any reasonable basis for the determination. Martin Electronics, Inc., B-221298, Mar. 13, 1986, 86-1 C.P.D. ¶ 252.

Shelf Stable had not demonstrated that the contracting officer's nonresponsibility determination lacked a reasonable basis. Simply stated, the above recitation of DLA's recent experience contracting with Shelf Stable establishes that the firm had been significantly delinquent in its deliveries up to the dates of the nonresponsibility determinations under the two RFP's in issue. As of those dates--December 19, 1986, for solicitation 8035, and January 5, 1987, for solicitation 8103--the firm had delivered only 688,896 of the total number of food pouches required under its combined DLA contracts for 5,363,320 pouches of ham, turkey, chicken and ground beef. Based on this record, we cannot dispute DLA's judgment that Shelf Stable's monthly capacity is too low to perform under the two solicitations 8103 and 8035. We also find Shelf Stable's assertion that it had in stock 250,000 pouches of ground beef that it could have committed to solicitation 8103 to be unpersuasive. Those pouches were, by the firm's own admission, already committed to contract Z008 for delivery in January 1987. Finally, we note that the November 5 award of contract Z008, which Shelf Stable suggests shows that as late as November DLA knew the firm had a substantial delivery capability, was effected before DLA decided to begin terminating contract Z050; in fact, DLA informs us that Shelf Stable has not met its delivery obligations under that contract either.

The protests are denied.


Harry R. Van Cleave
General Counsel